

EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHELE ERKAN, on behalf of herself,)
her minor child, and all others)
similarly situated,)

Plaintiff,) Civil Action
vs.) No. 12-12052-FDS
)

NEW ENGLAND COMPOUNDING)
PHARMACY, INC., d/b/a NEW ENGLAND)
COMPOUNDING CENTER, et al.,)
Defendants.)

ROBERT COLE,)
on behalf of himself and all)
others similarly situated,)

Plaintiff,) Civil Action
vs.) No. 12-12066-FDS
)

NEW ENGLAND COMPOUNDING)
PHARMACY, INC., d/b/a NEW ENGLAND)
COMPOUNDING CENTER, et al.,)
Defendants.)

JOHN DOE,)

Plaintiff,)
vs.)

) Civil Action
No. 12-12057-FDS

NEW ENGLAND COMPOUNDING)
PHARMACY, INC., d/b/a NEW ENGLAND)
COMPOUNDING CENTER, et al.,)
Defendants.)

1 LANCE MARTIN and TOBY MARTIN,
2 on behalf of himself and all
3 others similarly situated,
4 Plaintiffs,

5 vs.

6 NEW ENGLAND COMPOUNDING
7 PHARMACY, INC., d/b/a NEW ENGLAND
8 COMPOUNDING CENTER, et al.,
9 Defendants.

10 DIRK THOMPSON, III,
11 Plaintiff,

12 vs.

13 NEW ENGLAND COMPOUNDING
14 PHARMACY, INC., d/b/a NEW ENGLAND
15 COMPOUNDING CENTER, et al.,
16 Defendants.

17 ROBERT SCHRODER and MARGARET
18 SCHRODER,

19 Plaintiffs,

20 vs.

21 NEW ENGLAND COMPOUNDING
22 PHARMACY, INC., d/b/a NEW ENGLAND
23 COMPOUNDING CENTER, et al.,
24 Defendants.

25 MURIEL ARMSTRONG,

Plaintiff,

vs.

NEW ENGLAND COMPOUNDING
PHARMACY, INC., d/b/a NEW ENGLAND
COMPOUNDING CENTER, et al.,
Defendants.

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Civil Action
No. 12-12055-FDS

Civil Action
No. 12-12074-FDS

Civil Action
No. 12-12075-FDS

Civil Action
No. 12-12077-FDS

1 SANDRA HARRISON,

2 Plaintiff,

3 vs.

4 NEW ENGLAND COMPOUNDING

5 PHARMACY, INC., d/b/a NEW ENGLAND

6 COMPOUNDING CENTER, et al.,

7 Defendants.

) Civil Action

) No. 12-12078-FDS

8 LISA WEINSTEIN,

9 Plaintiff,

10 vs.

11 NEW ENGLAND COMPOUNDING

12 PHARMACY, INC., d/b/a NEW ENGLAND

13 COMPOUNDING CENTER, et al.,

14 Defendants.

) Civil Action

) No. 12-12103-FDS

15 RAYMOND McDOW and ROSEANNE

16 BROOKS, on behalf of himself and all

17 others similarly situated,

18 Plaintiffs,

19 vs.

20 NEW ENGLAND COMPOUNDING

21 PHARMACY, INC., d/b/a NEW ENGLAND

22 COMPOUNDING CENTER, et al.,

23 Defendants.

) Civil Action

) No. 12-12122-FDS

24 CHAD GREEN,

25 Plaintiff,

vs.

NEW ENGLAND COMPOUNDING

PHARMACY, INC., d/b/a NEW ENGLAND

COMPOUNDING CENTER, et al.,

Defendants.

) Civil Action

) No. 12-12121-FDS

1 GEORGE CARY, individually and as the)
2 personal representative of the Estate)
3 of LILIAN CARY,)
4 Plaintiff,)
5 vs.) Civil Action
6 No. 12-12123-FDS
7 NEW ENGLAND COMPOUNDING)
8 PHARMACY, INC., d/b/a NEW ENGLAND)
9 COMPOUNDING CENTER, et al.,)
10 Defendants.)
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MOTION HEARING

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

November 28, 2012
10:00 a.m.

Valerie A. O'Hara
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

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15 For the Defendants:

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1
2 VIA PHONE FOR The PLAINTIFFS:

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5 Atlanta, Georgia 30328.
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1 have a copy of if your Honor would like it, indicating that
2 they have no objection to the inspection of the facility, and
3 just by way of background, the investigation by the DPH and the
4 FDA began in September. Their preliminary reports were issued
5 in October.

6 Our understanding is from the perspective of the DPH
7 and the FDA is that their investigation is ongoing, but their
8 actual presence at the facility itself is not happening on a
9 daily basis or regular basis.

10:19AM 10 THE COURT: But, as I understand it, recalled products
11 presumably are coming in and something is being done with
12 those?

13 MS. DOUGHERTY: Certainly. From conferring with
14 defense counsel yesterday, what we understand, and they can
15 correct me if I'm wrong, the entity that's coming back to
16 collect those products is the DEA. So to the extent that we
17 need to work on weekends or around whatever is going on with
18 the governmental agencies, we are happy to do so, your Honor.

19 Just by way of background in terms of what the FDA and
10:19AM 20 the DPH has found, I'm not sure if your Honor has had an
21 opportunity to review those reports that there is physical
22 evidence at the facility that we are very concerned is going to
23 be further compromised, both equipment and evidence by way of
24 air sampling, swabbing of particular particles, and there's
25 also things that the government agencies didn't do that we're

1 very interested in looking at that is nondestructive, not
2 invasive, certainly some of it just requires looking at the
3 exterior of the building, doing some infrared scanning of the
4 exterior of the building, doing a visual, video and photograph
5 of the internal parts of the building, where things are,
6 looking at the HVAC components, things that weren't necessarily
7 looked at by the FDA but certainly could have contributed to
8 the contamination that occurred at the facility.

9 We have an expert on the line that's here to tell you
10:20AM 10 more about that if you're interested in hearing it, your Honor,
11 but what we would suggest in the interest of moving things
12 along and also providing an opportunity for both the FDA, the
13 DPH, any governmental agency to have a say is that your Honor
14 put an order in place that the inspection occur on or before
15 December 14th that will provide counsel an opportunity to
16 negotiate the protocol of the inspection, and it will also
17 allow government agencies to come forth and indicate whether or
18 not they have any objection over this inspection and for us to
19 work with those agencies because certainly we are happy to
10:21AM 20 provide the samples that we get on particular items that we
21 look at to the government agencies, and it may in fact assist
22 them in their process as well.

23 So what we're suggesting is a preliminary order of an
24 inspection on or before December 14th where we'll work together
25 with defense counsel on protocol and the government agencies to

1 the extent that we need to.

2 Your Honor may be aware that there are several cases
3 that support the importance of inspection even if it does cause
4 some hardship on the defendants or some minimal distraction,
5 and so a couple of those cases I might just cite is the Snowden
6 case, and that's 137 FRD, 325. In that case specifically the
7 Court found that the mere fact that compliance with an
8 inspection order will cause greatly or an expense or even
9 considerable hardship and possibility of injury to a business
10 on that party from which discovery is sought, it does not
11 itself require denial of a motion like this.

12 I might just mention, your Honor, that time is of the
13 essence. The further along that we go and we wait to get the
14 sampling, the further that it could be compromised, you know,
15 if we're waiting as the defendants are going --

16 THE COURT: Sampling meaning like bacteria sampling?

17 MS. DOUGHERTY: Yes, air sampling, bacteria sampling.

18 THE COURT: It's kind of after the fact, in other
19 words, maybe I'm jumping way ahead of myself here, what would a
20 current bacteria or air sample establish about what things were
21 like six months or a year ago?

22 MS. DOUGHERTY: Well, certainly I can have the expert
23 discuss that with you, but my understanding from what the
24 expert has said, it's not just the air sampling now, which can
25 be compared with the air sampling that was done by the FDA,

1 they indicate in their report that they did do air sampling,
2 but it's also sampling in HVAC systems where swabbing can be
3 done, and it's also sampling that could be done internally in
4 walls that can show degradation of rot.

5 Our experts are able to tell you what time frame that
6 rot had occurred, for example, if you open up a wall and you
7 see water but you would see a shiny nail, they can tell that's
8 a new leak; if you see water and a rusty nail, that's an old
9 leak.

10:23AM 10 My expert on the phone can be more technologically
11 accurate about all of those details, but certainly they're able
12 to -- they're able to see degradations of material over time
13 and able to pinpoint that, and, your Honor, if we're able to
14 find the same molds that's in these vials, if it's here now, it
15 was there then.

16 That's something that we're really concerned about
17 being able to sample and see if we're able to find the mold in
18 the facility and whether or not that mold matches with the mold
19 that was in these vials, and so the longer we wait, the harder
10:24AM 20 it's going to be for us to prove our case and for our clients
21 to get the justice that they deserve.

22 The defendants are going to suggest that you do this
23 some time after an MDL is formed. Your Honor, that's talking
24 March maybe at the earliest, and we simply cannot wait that
25 long. Not only would the evidence be compromised, but that

1 will give the defendants a clear opportunity to attempt to
2 challenge our experts on Daubert as finding that all of our
3 evidence is completely unreliable, and we just cannot allow the
4 plaintiffs to be prejudiced in that way.

5 We're willing and able to work with the government
6 agencies, we're happy to do so, we will work hand in hand with
7 them, we will do everything that they want us to do and stay
8 out of their way entirely, and, as I said, we suggested doing
9 some inspection on the weekend in order to avoid that.

10:24AM 10 So, your Honor, we're just asking that you put an
11 interim order in place for an inspection by December 14th so
12 that we can work on these issues. This goes -- I think Sister
13 counsel has something that she would like to say on the
14 inspection issue. I'll take up the preservation issue
15 afterwards.

16 THE COURT: Counsel.

17 MS. PARKER: Thank you. Your Honor, we would just
18 request that the order, if you determine to issue one, should
19 make clear that it requires plaintiffs' counsel to coordinate
10:25AM 20 with all federal and state and any other governmental
21 authorities as well as we suggest plaintiffs' counsel and other
22 actions pending across the country. We believe that
23 coordination among those other plaintiffs' counsel is possible
24 and is advantageous here.

25 THE COURT: All right. I'm sorry, Ms. Dougherty, you

1 had something else?

2 MS. DOUGHERTY: On the preservation issue, your Honor,
3 if you'd like to hear from the defendants on inspection first,
4 I can get to preservation after that.

5 THE COURT: Why don't you tell me a few bars about
6 preservation.

7 MS. DOUGHERTY: Okay. Clearly your Honor understands
8 how important preservation of not only documents but also
9 physical evidence is in this case. It's routinely ordered, and
10:26AM 10 it's something that we feel is very, very important at this
11 point. We understand that there has been -- there have been
12 governmental agencies that have gone into the facility.
13 There's been some seizing of assets, there's been vials that
14 have been taken and quarantined and things like that.

15 We understand that there are some things that are not
16 within the control of the defendants, however, there are some
17 things that are in control, and so what we are looking for is
18 to preserve not just documents and equipment but also not allow
19 alteration of things to occur in this facility so that when we
10:26AM 20 do in fact have an opportunity to inspect that it is as close
21 as possible to the condition that it was in at the time of the
22 misconduct in this case, and so, your Honor, we have a proposed
23 interim preservation order that we'd like to pass up to you
24 which allows us to preserve in a way that we think protects the
25 plaintiffs but also gives us time to work with the defense

1 anything else anyone wants to take up? Okay. Hearing nothing,
2 thank you all, and I will see you I guess a week from Monday.

3 MS. PARKER: Thank you, your Honor.

4 MR. FERN: Thank you, your Honor.

5 (Whereupon, the hearing was adjourned at 11:12 a.m.)

6 C E R T I F I C A T E

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8
9 UNITED STATES DISTRICT COURT)
10 DISTRICT OF MASSACHUSETTS) ss.
11 CITY OF BOSTON)
12

13 I do hereby certify that the foregoing transcript,
14 Pages 1 through 51 inclusive, was recorded by me
15 stenographically at the time and place aforesaid in Civil
16 Action Nos. 12-12052-FDS and No. 12-12066-FDS, ERKAN, COLE, et
17 al. vs. NEW ENGLAND COMPOUNDING PHARMACY, INC., d/b/a NEW
18 ENGLAND COMPOUNDING CENTER, et al. and thereafter by me reduced
19 to typewriting and is a true and accurate record of the
20 proceedings.

21 Dated this December 3, 2012.

22 s/s Valerie A. O'Hara

23 _____
24 VALERIE A. O'HARA

25 OFFICIAL COURT REPORTER